

STATE OF CALIFORNIA
CALIFORNIA ENVIRONMENTAL PROTECTION AGENCY
STATE WATER RESOURCES CONTROL BOARD

DIVISION OF WATER RIGHTS

**ORDER WR XXXX-XXXX-DWR
[DRAFT] CEASE AND DESIST ORDER**

**In the Matter of Diversion or
Use of Water for Cannabis
Cultivation**

By

Nicolas Baker

In

Trinity County

On

APN: 018-220-021-00, 018-220-022-00

SOURCE: Unnamed spring, unnamed stream, and unnamed stream

The State Water Resources Control Board (State Water Board), hereby finds:

SUMMARY OF DETERMINATIONS

1. Based on the facts and information contained herein, Nicolas Baker (hereinafter the Diverter) is violating or threatening to violate requirements set forth in Water Code section 1831, subdivision (d)(6)(A)-(B):
 - a. State Water Board, Division of Water Rights (Division) staff observed the Diverter using water to cultivate approximately 5,456 cannabis plants on May 12, 2021, without a license issued by CDFA¹ as required by Chapter 6 of Division 10 of the Business and Professions Code (Bus. & Prof. Code, § 26060 et. seq.); and
 - b. Division staff also observed and documented diversions of water for cannabis cultivation in violation of an applicable requirement established by the State Water Board in the Cannabis Cultivation Policy – Principles and Guidelines for Cannabis Cultivation (Cannabis Cultivation Policy) pursuant to Water Code,

¹ Three state programs merged to form the Department of Cannabis Control (DCC). Those programs were the Bureau of Cannabis Control in the Department of Consumer Affairs, the Manufactured Cannabis Safety Branch in the Department of Public Health, and CalCannabis Cultivation Licensing in the Department of Food and Agriculture. Effective July 12, 2021, DCC is the state program tasked with licensing, inspecting, and regulating cannabis activities in California. However, because the site inspections and records review for this matter occurred prior to July 12, 2021, this Order references CDFA rather than DCC when identifying the licensing agency.

section 13149.

2. This Order directs the Diverter to cease and desist the activities causing the violation(s) or threatened violation(s) and to take the corrective actions described below.

CEASE AND DESIST ORDER AUTHORITY

3. Water Code section 1831, subdivision (a), provides that the State Water Board may issue an order to cease and desist from violation(s) or threatened violations(s) of the requirements described in section 1831, subdivision (d). Specifically, Water Code section 1831, subdivision (d)(6) provides:

(6) Any diversion or use of water for cannabis cultivation if any of paragraphs (1) to (5), inclusive, or any of the following applies:(A) A license is required, but has not been obtained, under Chapter 6 (commencing with Section 26060) or Chapter 7 (commencing with Section 26070) of Division 10 of the Business and Professions Code.

(B) The diversion is not in compliance with an applicable limitation or requirement established by the board or the Department of Fish and Wildlife under Section 13149.

(C) The diversion or use is not in compliance with a requirement imposed under paragraphs (1) and (2) of subdivision (b) of Section 26060.1 of, and paragraph (3) of subdivision (a) of Section 26070 of, the Business and Professions Code.

4. Water Code section 1834, subdivision (a), provides that the State Water Board shall give notice informing the party that he or she may request a hearing not later than 20 days from the date on which the notice is received. If the party does not timely request a hearing, section 1834, subdivision (a) authorizes the State Water Board to adopt a cease-and-desist order based on the statement of facts and information set forth in the notice without a hearing. The State Water Board delegated this authority to the Deputy Director for Water Rights in Resolution 2012-0029. The Deputy Director has redelegated this authority to the Assistant Deputy Director for Water Rights.

STATEMENT OF FACTS AND INFORMATION

5. Property:
The violations and threatened violations at issue were observed on Trinity County Assessor's Parcel Numbers (APN) 018-220-21-00 and 018-220-22-00 (hereinafter the Property).
6. Property Ownership:
According to Trinity County property records, the Diverter purchased Trinity County Assessor's Parcel Number (APN) 018-220-21-00 on September 17, 2015, and APN 018-220-22-00 on December 5, 2013 (collectively "the Property"). The Diverter has owned the Property at all times relevant here.
7. Watershed Information:

The Property is located in the Browns Canyon watershed (CalWater watershed No. 1111.220201) tributary to the Van Duzen River. Water for cannabis cultivation was diverted at four points of diversion (POD) from two unnamed streams and an unnamed spring that are tributary to the Van Duzen River. Downstream from the Property, in neighboring Humboldt County, the Van Duzen River is designated as a California Wild and Scenic River from the Dinsmore Bridge downstream to the confluence with the Eel River. As a Wild and Scenic River, the State Water Board is limited to processing or accepting new applications to appropriate water unless the diversion and use of water fall within two limited exceptions approved by the Secretary of the Resources Agency pursuant to California Code of Regulation, Title 23, section 734. In accordance with the Public Resources Code, Division 5 Chapter 1.4, California Wild and Scenic Rivers Act, section 5093.50 et seq., it is the policy of the State of California, that certain rivers which possess extraordinary scenic, recreational, fishery, or wildlife values shall be preserved in their free-flowing state, together with their immediate environments, for the benefit and enjoyment of the people of the state. The Legislature declares that such use of these rivers is the highest and most beneficial use and is a reasonable and beneficial use of water within the meaning of section 2 of Article X of the California Constitution.

8. Inspection Basis:

On May 7, 2021, the Division was notified by the Department of Fish and Wildlife (CDFW) of a search warrant inspection of the Property based on suspected illegal cannabis cultivation and possible surface water diversion used for cannabis cultivation.

9. Water Rights Records Review:

On May 10, 2021, prior to the inspection, and recently, on May 12 2022, Division staff examined available State Water Board water rights records in the electronic Water Rights Management System (eWRIMS) and did not find any evidence of an existing Statement, water right permit, license, or registration for diversion and use of water on the Property. On February 10, 2022, Division staff checked eWRIMS and again did not find any evidence of an existing water right permit, license, or registration for the diversion and use of water Division staff observed taking place on the Property, nor that a Statement had ever been filed regarding the observed diversions. Division staff checked again on August 17, 2022 and did not find a water right record for Nicolas Baker.

10. Well Records Review:

On or around May 10, 2021, Division staff reviewed the Department of Water Resources database of Well Completion Reports and found no record of a well on the Property at the time of the inspection.

11. May 12, 2021 Inspection:

On May 12, 2021, Division staff accompanied CDFW and Trinity County Sheriff's Office in conducting an inspection of the Property. During the inspection, the Diverter's cannabis plants were eradicated by CDFW Wardens. During the inspection, Division staff observed a total of approximately 5,456 plants and (4) four Points of Diversion (POD) and related water conveyance and irrigation infrastructure throughout the Property. At the conclusion of the inspection, Division staff left a Field Notice of Violation (Field NOV) with the search warrant on the Property.

12. Points of Diversion:

Division staff observed and documented four Points of Diversion (POD) during the May 12, 2021, inspection.

- a. POD1 is point of diversion to off-stream storage located on an unnamed spring that is a tributary to the Van Duzen River. The unnamed spring was excavated out to create a hole 3-feet wide and 3-feet deep. The excavated earthen materials were piled up to make a small dam (1 foot high and 1 foot wide) to collect and hold water in a pool of water to convey by gravity to off-stream water storage tanks. The spring was flowing but the downstream channel below the spring was not. Division staff observed POD1 diverting all natural spring flow during the inspection. If water was not diverted by POD1, the natural spring flow would naturally flow down the stream channel and off the property.
- b. POD2 is a point of diversion on an unnamed stream that is a tributary to the Van Duzen River. A water pump and hose were used to divert water from a natural pool formed in the unnamed stream that was approximately 4 feet wide and 0.5 feet deep. The unnamed stream has defined bed and banks upstream and downstream from POD2 and water was flowing into and out of the natural pool at the time of the inspection, but the pump was not on. When the pump is turned on, water is conveyed to off-stream water storage tanks. The stream was flowing but POD2 was not actively diverting during the inspection. Division staff find that based on observations, POD2 was likely the primary POD and source of water for cannabis cultivation at the time of the inspection. Division staff based this finding on less water available at POD1 and POD4 and water from POD3 supplied water to POD2 to increase the amount of water available at POD2 when the gas pump was operating. POD2's gas pump was also connected to 30,000 gallons of off-stream water storage at Point of Storage (POS) 4 (POS4) compared to 45,000 gallons between the other seven POS on the property, six of which receive water that is first stored at POS4.
- c. POD3 is located approximately 100 feet upstream of POD2 on the same unnamed stream. The unnamed stream was flowing and POD3 was actively diverting during the inspection. POD3 consists of two unscreened irrigation pipes placed in the stream, from which water is diverted via gravity downstream to POD2. Division staff observed water flowing from POD3 to POD2 during the inspection. This configuration indicates that water diverted from POD3 is diverted to POD2 and then from POD2 water is diverted by operating a gas pump to fill off stream storage at POS4.
- d. POD4 is located on an unnamed stream with defined bed and banks that is tributary to the Van Duzen River. The stream was flowing and POD4 was actively diverting during the inspection. POD4 consists of hand stacked rocks in the stream channel to create two small pools of water that convey water by gravity through two 1-inch black polyethylene pipes to off stream water storage tanks at POS8.
- e. POD1, POD2, POD3, and the related POSs and POUs (except for POU3), are located on APN 018-220-22-00 and comprise the water conveyance system that irrigates cannabis at POU 1-3 and provides domestic water at POU4. POD4, POS8, and POU5, constitutes a separate water conveyance system for only

cannabis cultivation at POU5. POD4, POS8, and POU3 and POU5, are located on APN 018-220-21-00.

13. Inspection Findings and Observations:

During the May 12, 2021 inspection, Division staff observed surface water actively being diverted from POD1, POD3, and POD4 to irrigate cannabis. Division staff observed approximately 5,465 cannabis plants in seven greenhouse structures on the Property.

14. Aerial Imagery Review:

On May 17, 2021, Division staff reviewed aerial imagery of the Property and made the following observations:

- a. Google Earth Pro aerial imagery from May 28, 2014, shows greenhouses consistent with those observed at POU2 during the May 12, 2021, inspection.
- b. Google Earth Pro aerial imagery from June 2, 2016, shows greenhouses consistent with those observed at POU1, POU2, and POU4 during the May 12, 2021, inspection.
- c. Google Earth Pro aerial imagery from November 11, 2018, shows greenhouses consistent with those observed at POU1, POU2, and POU5 during the May 12, 2021, inspection.
- d. LandVision aerial imagery from April 11, 2020, shows greenhouses consistent with those observed at POU1, POU2, and POU5 during the May 12, 2021, inspection.

15. Confirmation of the Need for a CDFA License:

The California Department of Food and Agriculture² (CDFA) established a commercial cannabis cultivation licensing program pursuant to Chapter 6 (commencing with section 26060) of Division 10 of the Business and Professions Code. CDFA began issuing licenses on January 1, 2018. While the Division is not responsible for determining the specific type of state cultivator license type that CDFA would have required here, based on the review of aerial images and Division staff's observations during the site inspection, the cannabis cultivation occurring on the Property is of a scale sufficient to require a commercial cannabis cultivation license under Chapter 6 (commencing with Section 26060) of Division 10 of the California Business and Professions Code as more than six living cannabis cultivation plants were observed.

16. CDFA License Records Review:

On May 17, 2021, and again on February 10, 2022, Division staff reviewed CDFA's commercial cannabis cultivation license records current to February 2, 2022, to determine if there was an active or pending license on file that would legally authorize the commercial cannabis cultivation observed on the Property. Division staff found no

² The California Department of Food and Agriculture (CDFA) was the state licensing authority for commercial cannabis cultivation until those functions were legislatively merged into DCC on July 12, 2021. The DCC records reviewed by Division staff on October 8, 2021, include CDFA licenses issued prior to July 12, 2021. For ease of reference in this Complaint, all references to DCC for licenses or licensing requirements that existed at the time of the inspection shall mean CDFA and DCC shall be used to denote the Department.

CDFA license on record for the Property. Division staff checked again on August 17, 2022, and did not find a licensing record for Nicolas Baker.

17. Inspection Report and Notice of Violation:

The Division has made three attempts to deliver the Diverter a Notice of Violation (NOV) and Inspection Report (IR) via United State Postal Service (USPS) certified mail. First on July 15, 2021, then again on September 16, 2021, and finally on November 10, 2021. The NOV/IR describes the observations made by Division staff during the inspection, notifies the Diverter that the observed violations may subject them to enforcement by the State Water Board and recommends corrective actions to address each alleged violation. As of the date of this compliant, the Division has been unable to deliver the NOV/IR.

18. Response to Notice of Violation:

As of the date of this Order, the Diverter has not responded to the Field NOV. Division staff have no knowledge or evidence to suggest any of the recommended corrective actions have been taken.

19. Cannabis Cultivation Policy Requirements: The State Water Board's *Cannabis Cultivation Policy – Principles and Guidelines for Cannabis Cultivation* (Cannabis Cultivation Policy) originally went into effect on December 18, 2017.³ The Policy contains principles, guidelines and requirements (Requirements) adopted pursuant to Water Code section 13149, for the diversion or use of water for cannabis cultivation in areas where cannabis cultivation may have the potential to substantially affect instream flow.

- a. The Cannabis Cultivation Policy defines cannabis cultivation as: *“Any activity involving or necessary for the planting, growing, pruning, harvesting, drying, curing, or trimming of cannabis. This term includes but is not limited to: (1) water diversions for cannabis cultivation, and (2) activities that prepare or develop a cannabis cultivation site or otherwise support cannabis cultivation and which discharge or threaten to discharge waste to waters of the state.”*
- b. Division staff observed numerous violations of Cannabis Cultivation Policy Requirements during the May 12, 2021, inspection, and documented those violations in the Field NOV, including: diverting water for cannabis cultivation during the surface water forbearance period (Term 66); failing to plug, block, disconnect, or remove diversion intakes and otherwise bypass flows or render diversions inoperable during the surface water forbearance period (Term 77); failing to install separate measuring devices to quantify water diversions for beneficial uses other than cannabis cultivation (Term 81); failing to install and maintain measuring devices for surface water diversions and retaining daily diversion records (Term 82); failing to use water storage tanks equipped with a float valve (Term 92); failing to ensure that all vents and other openings on water storage tanks are designed to prevent entry and/or entrapment of wildlife (Term 93); and failing to maintain daily records of all water used for irrigation of cannabis (Term 98).

³ The State Water Board on October 17, 2017, adopted the Cannabis Policy (Order No. WQ-2017-0023-DWQ). This Order became effective December 18, 2017 upon the approval of the Office of Administrative law. On February 5, 2019, the State Water Board adopted Order No. WQ-2019-001-DWQ, amending the Cannabis Policy effective April 16, 2019.

- c. The Diverter's failure to respond to the Division's Field NOV, coupled with the history of cannabis cultivation on the site, constitutes a threat to violate these and other Requirements in the future.

ALLEGED VIOLATIONS AND THREATENED VIOLATIONS

20. Based on the findings described above, including observations made during the inspection, the Diverter is violating or threatening to violate a requirement described in Water Code section 1831, subdivision (d)(6)(A):

- a. Any person engaged in commercial cannabis activity must obtain a state license from CDFA. (Bus. & Prof. Code § 26037.5, subd. (a); 4 Cal. Code Regs. §15000.1, subd. (a).) "Commercial cannabis activity" includes cultivation. (Bus. & Prof. Code § 26001, subd. (j); 4 Cal. Code Regs. § 15000, subd. (o).) The only exceptions to the cultivation licensing requirement are for persons cultivating not more than six living cannabis plants, or certain nonprofit entities in limited circumstances not applicable here. (Bus. & Prof. Code § 26037.5, subd. (b).) CDFA's cultivation licensing requirements are set forth in Chapter 6 of Division 10 of the Business and Professions Code, commencing at section 26060.
- b. During the May 12, 2021, inspection, Division staff observed approximately 5,456 cannabis plants growing in 7 greenhouses, with an approximate total cultivation area of 10,391 sq. ft., irrigated from surface water diversions at POD 1-4. Cannabis cultivation of the scale observed by Division staff on the Property required a CDFA commercial cannabis license under Chapter 6 (commencing with Section 26060) of Division 10 of the Business and Professions Code.
- c. On February 2, 2022, Division staff verified that the Diverter still had not obtained a cultivation license for the activities observed on the Property. The Diverter has not contacted Division staff to indicate whether they intend to continue cultivation activities on the Property; however, the Diverter appears to have a history of cultivation based on review of aerial imagery from 2014-2020. It is likely that the Diverter will continue to divert or use water for commercial cannabis cultivation on the Property that requires a license under Chapter 6 (commencing with Section 26060) of Division 10 of the Business and Professions Code.
- d. The Diverter's lack of necessary state licensing, coupled with the history of cannabis cultivation on the site, constitutes a threat to cultivate without necessary licensing in the future.

21. Based on the findings described above, including observations made during the inspection, the Diverter is violating or threatening to violate a requirement described in Water Code section 1831, subdivision (d)(6)(B):

- a. Division staff documented that the Diverter failed to comply with an applicable requirement established by the State Water Board in the Cannabis Cultivation Policy pursuant to Water Code, section 13149.
 - i. **Cannabis Cultivation Policy, Attachment A, Section 2, Term 66 Violation:** Term 66 requires that all surface water diversions for cannabis cultivation comply with the surface water Numeric and

Narrative Instream Flow Requirements found in the Cannabis Cultivation Policy. Numeric and Narrative Instream Flow Requirements No. 4 prohibits surface water diversions for cannabis cultivation activities between April 1 through October 31 of each calendar year. During the May 12, 2021 inspection, Division staff documented active surface water diversion from POD1, POD3, and POD4 for cannabis cultivation during the forbearance period in violation of this requirement. Division staff find that based on observations, POD2 was likely the primary POD and source of water for cannabis cultivation at the time of the inspection. Division staff based this finding on less water available at POD1 and POD4 and water from POD3 supplied water to POD2 to increase the amount of water available at POD2 when the gas pump was operating. POD2's gas pump was also connected to 30,000 gallons of off-stream water storage at Point of Storage (POS) 4 (POS4) compared to 45,000 gallons between the other seven POS on the property, six of which receive water that is first stored at POS4. LandVision aerial imagery from 2014, 2018, and 2020 depicts greenhouses at POU1, POU2, and POU5 with what appears to be cannabis plant present. Division staff observed cannabis cultivation in the greenhouses located at POU1, POU2, and POU5 during the May 12, 2021 inspection. Aerial imagery from 2014 - 2020 and observations made during the May 12, 2021 inspection suggests that the greenhouses were likely used for cannabis cultivation on the Property since 2014. The PODs were the sole source of water observed on the Property during the inspection and was likely used to irrigate any cannabis grown dating back to 2014.

- ii. The Diverter has not contacted Division staff in response to the Field NOV or provided any evidence that the corrective actions have been taken. In light of the aerial imagery indicating a history of cannabis cultivation activities on the Property, the seasonal nature of cannabis cultivation, and the Diverter's failure to provide Division staff information in response to the Field NOV, it is likely that the Diverter will continue to cultivate cannabis on the Property and divert surface water during the next forbearance period in violation of this requirement.

SECTION 1834 NOTICE REQUIREMENTS

22. On August 26, 2022, in accordance with Water Code section 1834, subdivision (a), the State Water Board's Division of Water Rights (Division), provided the Diverter with notice of the State Water Board's intent to issue an order determining that the Diverter is violating or threatening to violate requirements described in Water Code section 1831, subdivision (d)(6)(A)-(B).
23. The notice included the facts and information stated above, which describe the basis for the violations and threatened violations, and informed the Diverter that unless a written request for a hearing signed by or on behalf of the notified party is delivered to or received by mail by the State Water Board within 20 days after receipt of the notice, the State Water Board may adopt a cease and desist order based on the statement of facts and information set forth in the notice, without a hearing.

IT IS HEREBY ORDERED, pursuant to sections 1831 through 1836 of the California Water Code, that:

1. The Diverter shall immediately cease and desist any diversion and use of water from the unnamed stream for cannabis cultivation until a CDFA commercial cannabis license under Chapter 6 (commencing with Section 26060) of Division 10 of the Business and Professions Code is obtained. The requirement to obtain a cultivation license also incorporates the requirement to obtain a water right pursuant to Business and Professions Code section 26060.1(a)(2)(A).
2. Within 30 days of the date of adoption of this CDO, the Diverter shall submit a draft compliance plan for review and approval by the Division that details what actions will be taken to ensure that a commercial cannabis license is obtained prior to any diversion or use of water from the unnamed stream and that water will not be diverted from the unnamed stream during the forbearance period (April 1 - October 31) for irrigation of cannabis. To the extent that the Diverter intends to continue cannabis cultivation activities on the Property, irrigated with water diverted from the unnamed stream, the draft compliance plan must include installation of adequate water storage to enable the Diverter to divert during the non-forbearance period and store water at a capacity sufficient to irrigate through the forbearance period without diverting from the stream. If the Diverter intends to seasonally store water diverted from the stream, the draft compliance plan must also include a timeline for obtaining an appropriative water right, such as a Cannabis Small Irrigation Use Registration.
3. Within 60 days of the final compliance plan approval date, the Diverter must implement the compliance plan.

ADDITIONAL INFORMATION

Consequences of Non-Compliance

Failure to comply with the requirements of this Order may result in additional enforcement, which may include the imposition of administrative civil liability or referral to the Attorney General to take further injunctive enforcement actions or seek civil liability, pursuant to Water Code section 1845. Civil liability, whether administrative or judicial, may be up to \$1,000 for each day in which the violation occurs, or up to \$10,000 for each day in which the violation occurs during drought.

Reservation of Enforcement Authority and Discretion

Nothing in this Order is intended to or shall be construed to limit or preclude the State Water Board from exercising its authority under any statute, regulation, ordinance, or other law.

Regulatory Changes

Nothing in this Order shall excuse the Diverter from meeting any more stringent requirements that may be imposed hereafter by applicable legally binding legislation, regulations, or water right permit requirements.

Compliance with Other Regulatory Requirements

Nothing in this Order shall excuse the Diverter from meeting any additional regulatory requirement that may be imposed by other local, State, or federal regulatory entities for corrective actions taken to comply with this Order.

Exemption from CEQA

This is an action to enforce the laws and regulations administered by the State Water Board. The State Water Board finds that issuance of this Order is exempt from the provisions of the California Environmental Quality Act (Public Resources Code, sections 21000 et seq.), in accordance with section 15321(a)(2), Title 14, of the California Code of Regulations. This action may also be considered exempt because it is an action by a regulatory agency for the protection of natural resources (Cal. Code Regs., tit. 14, § 15307) and an action by a regulatory agency for the protection of the environment (Cal. Code Regs., tit. 14, § 15308).

Effective Date

This Order is effective upon issuance, pursuant to Water Code section 1832.

Petition for Reconsideration

Any interested person or entity may petition the State Water Board for reconsideration of this Order pursuant to Water Code section 1122. Such petition shall be filed not later than 30 days from the date the State Water Board adopts this Order.

STATE WATER RESOURCES CONTROL BOARD